Filed 8/15/19 P. v. Flores CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SAMUEL ERNESTO FLORES,<br><br>Defendant and Appellant. | B290135<br><br>(Los Angeles County Super. Ct. No. KA114101) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

---

A jury convicted Samuel Ernesto Flores of continuous sexual abuse of a child under the age of 14 years and committing a lewd act upon a child under the age of 14 years. The court sentenced him to 30 years to life in prison and imposed various fines, fees, and assessments. On appeal, Flores contends the trial court erred in permitting testimony from an expert on the behaviors of child sexual abuse victims and in failing to consider his ability to pay the fines, fees, and assessments. He also contends he received ineffective assistance of counsel. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

We summarize the evidence in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

Between approximately 2007 and 2012, Flores lived with Juana L. and her two daughters, L.D., born in March 2001, and J.D., born in February 2004. In October 2016, Juana asked L.D. and J.D.'s aunt to speak with them about their poor behavior. The aunt asked the girls if Flores sexually abused them, and J.D. replied that he had. L.D. started to cry but did not say anything. During subsequent interviews with a detective and forensic interviewer, L.D. and J.D. disclosed that Flores repeatedly sexually abused them over the course of several years. The abuse ended when Flores moved out of the house in 2012.

*Criminal Proceedings*

Flores was charged by information with one count of continuous sexual abuse of a child under the age of 14 years (Pen. Code, § 288.5, subd. (a))[1] and one count of committing a lewd or lascivious act upon a child under the age of 14 years

---

[1] All further undesignated statutory references are to the Penal Code.

(§ 288, subd. (a)). It was further alleged that section 667.61, subdivisions (b) and (e) applied to each count.

The case was tried to a jury in February 2018. The People called as witnesses L.D., J.D., and their aunt. The People also presented expert testimony on the behaviors of child sexual abuse victims, which we discuss in detail below.

L.D. testified that, between 2007 and 2012, Flores touched her vagina and breasts while they were on a hammock, ejaculated after showering with her and J.D., licked her vagina, made her and a neighbor boy watch pornography, made her and J.D. pose naked, made her lick honey off his penis, inserted his fingers into her vagina, touched her vagina while they watched a movie, and climbed into her bed and touched her vagina. All of these incidents occurred while L.D. was between the ages of six and eleven years old.

J.D. testified that Flores touched her and L.D.'s vaginas while they showered, and would climb into her bed at night and touch her vagina. J.D. was, at most, eight years old when these incidents occurred.

L.D. and J.D. explained that they did not immediately disclose the abuse because Flores had threatened them, they had watched him physically attack their mother, and they were fearful of him.

On cross examination, Flores's counsel extensively questioned L.D. and J.D. about inconsistencies between their trial testimony and their prior statements about the abuse. In prior interviews, L.D. failed to disclose that Flores made her and a neighbor boy watch pornography, made varying statements about the number of times Flores touched her, and failed to disclose that Flores once ejaculated in the bathtub. J.D. had also

provided somewhat inconsistent accounts of the abuse in prior interviews, including about whether Flores put her hand on his penis, whether he touched both J.D. and L.D., and how often the abuse occurred.

During closing argument, Flores's counsel highlighted the various inconsistencies in L.D.'s and J.D.'s testimony, noting they "should have been consistent. The truth is consistent." Counsel also stressed the length of time between the abuse and when the victims disclosed it. In addition, counsel pointed out that L.D. and J.D. showed little emotion while testifying, which she suggested was inconsistent with them actually having been abused.

*Verdict and Sentencing*

The jury convicted Flores as charged. Pursuant to section 677.61, subdivisions (b) and (e), the court sentenced him to an aggregate term of 30 years to life, consisting of consecutive 15-years-to-life sentences on each count. The court also imposed various fines, fees, and assessments, which we discuss in detail below.

Flores timely appealed.

## DISCUSSION

### I. The Trial Court Did Not Err in Allowing CSAAS Testimony

Flores asserts the trial court erred in allowing the People to present expert testimony regarding common behaviors of child sexual abuse victims, which is often referred to as Child Sexual Assault Accommodation Syndrome (CSAAS) evidence. Flores forfeited these claims and they also lack merit.

**A. Background**

Before trial, the prosecutor filed a motion asking the court to allow her to introduce expert testimony on CSAAS. At the hearing on the parties' various pre-trial motions, the court implicitly granted the prosecutor's motion by noting that CSAAS expert testimony "certainly is permissible." Defense counsel did not object, and the court and parties quickly moved on to other issues.

During the People's case-in-chief, the prosecutor presented expert testimony from Dr. Jayme Jones, who is a clinical psychologist and treats sexual abuse victims. Dr. Jones explained that CSAAS is a model that was developed to help explain some behaviors of sexually abused children that are inconsistent with common expectations.

According to Dr. Jones, there is a common misconception that victims immediately disclose the abuse. In reality, most victims never disclose, while some disclose years after the abuse occurred. Dr. Jones explained that disclosure is less likely if a child has been threatened, even after the threat is no longer present.

Dr. Jones said she has personally treated patients who delayed their disclosures, and she has found that victims decide to disclose abuse for a variety of reasons that are personal. Typically, being directly asked is the method most likely to result in disclosure.

According to Dr. Jones, there is also a common misconception that a victim will initially tell their entire story beginning to end. In reality, disclosures typically start with a vague statement. How much victims disclose is a function of

their level of comfort, the questions asked, and whether they want to talk about the abuse on that particular day.

Based on Dr. Jones's experience, it is also common for sexually abused children to change and confuse details of the abuse over time. This can be explained by the fact that victims try not to think about the abuse and may want to forget the experience.

Dr. Jones noted another misconception is that abuse victims will be tearful when recounting the abuse. She explained that child victims do not react to trauma in the same way, and it is not uncommon for some children to show little to no emotion while discussing abuse. In Dr. Jones's experience, therapy allows a victim to discuss abuse in a neutral way.

As the prosecutor began to ask Dr. Jones a hypothetical question, the court interrupted and admonished the jury as follows:

"Ladies and gentlemen, you need to understand that Dr. Jones' testimony on this child abuse accommodation syndrome topic is not evidence in any way, shape, or form that Mr. Flores is guilty of any of the crimes charged. It's only being offered to establish whether or not [J.D.] and [L.D.'s] conduct is not inconsistent with someone who has indeed been molested and help you determine the credibility of those witnesses when you hear their testimony. And that's why any hypothetical that is asked a witness, it's going to—it's asking the witness to assume that certain facts are true and to render an opinion based on those assumed facts. You must decide whether the assumed facts [have] been proven by the evidence that you've heard in evaluating the credibility of the expert witness's testimony.

"If you find or determine that an assumed fact has not been proven by the evidence, you must take that into consideration in evaluating the believability of the expert's testimony. She's basing her testimony solely on a hypothetical scenario, not specifically on this case."

The prosecutor then asked Dr. Jones the following hypothetical question: "Just assume . . . there are two people who experience sexual assault together. There's a perpetrator committing a sexual assault on the two victims at the same time. Assume that the victims of the sexual assault are under the ages of ten, one being a little older than the other and over the age of four. Would you expect the details in their individual memories to be the same about that event?" Dr. Jones responded that she would not expect their memories to be the same given the nature of memories and the age of the victims. She explained that younger children, in particular, have difficulty recalling a consistent narrative.

At the close of evidence, the trial court instructed the jury with CALCRIM No. 1193: "You have heard testimony from Dr. Jayme Jones regarding Child Sexual Abuse Accommodation Syndrome. Dr. Jayme Jones's testimony about Child Abuse Accommodation Syndrome is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not [L.D.] and [J.D.'s] conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of her testimony."

**B. Relevant Law**

Expert testimony on the common reactions of child sexual abuse victims—often referred to as CSAAS—is not admissible to

show the child has been abused. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 (*McAlpin*).) However, "it has long been held that . . . CSAAS is admissible evidence for the limited purpose of disabusing the fact finder of common misconceptions it might have about how child victims react to sexual abuse." (*In re S.C.* (2006) 138 Cal.App.4th 396, 418; see, e.g., *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 (*Patino*); *People v. Housley* (1992) 6 Cal.App.4th 947, 955–956; *People v. Bowker* (1988) 203 Cal.App.3d 385, 394 (*Bowker*).) For example, such evidence may be used to rehabilitate a "witness's credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation." (*McAlpin, supra*, 53 Cal.3d at p. 1300; see *Patino, supra*, 26 Cal.App.4th at p. 1746 [CSAAS evidence admissible to show why victim acted as she did and explain her state of mind].) "[T]he decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' " (*McAlpin, supra*, 53 Cal.3d at p. 1299.)

**C. Analysis**

Flores contends that Dr. Jones's testimony exceeded the permissible scope of CSAAS evidence because it was not targeted at specific myths or misconceptions suggested by the evidence. Instead, Flores argues, by focusing on behaviors that are "common" or "not uncommon" for child sexual abuse victims, Dr. Jones created a "profile" of such a victim. He asserts that, because L.D. and J.D. fit that profile, the prosecutor improperly invited the jury to use Dr. Jones's testimony to find it more likely that they were sexually abused by Flores. We disagree.

Initially, Flores forfeited these claims by failing to make a specific objection in the trial court. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 20 [failure to make a timely and specific objection on the ground asserted on appeal makes that ground not cognizable].) Nonetheless, we will address the merits of his arguments to forestall his derivative ineffective assistance of counsel claim.

Contrary to Flores's arguments, Dr. Jones's testimony did not exceed the permissible scope of CSAAS evidence. Dr. Jones simply identified certain unexpected behaviors that are common among children who have been sexually abused. She then explained, using the CSAAS model and her own professional experience, the reasons children may act in such unexpected ways. In doing so, Dr. Jones identified and disabused the jury of misconceptions about the behavior of child sexual abuse victims. This is the precise purpose for which CSAAS evidence is admissible. (See *McAlpin, supra*, 53 Cal.3d at pp. 1300–1301.)

The fact that L.D. and J.D. exhibited many of the behaviors discussed by Dr. Jones does not render the testimony inadmissible profile evidence. To be admissible, CSAAS evidence must be "targeted to a specific 'myth' or 'misconception' suggested by the evidence." (*Bowker, supra*, 203 Cal.App.3d at pp. 393–394.) Consequently, in every case in which CSAAS evidence is properly admitted, the prosecutor's questions and expert's testimony will necessarily mirror the facts of the case to some extent.

Here, the primary misconceptions Dr. Jones discussed—delayed disclosure, inconsistent reporting, and lack of emotion—were suggested by the evidence: L.D. and J.D. waited several years to disclose the abuse, provided somewhat inconsistent

accounts of the abuse, and displayed a relatively flat affect while discussing the abuse. Flores's counsel, in turn, argued at length that such behaviors are inconsistent with L.D. and J.D. having been abused. Dr. Jones's expert testimony, therefore, was properly admitted to disabuse the jury of such misconceptions and rehabilitate the victims' credibility.

The trial court also took care to ensure the jury did not use Dr. Jones's testimony for an improper purpose. The court twice admonished the jury that Dr. Jones's testimony is not evidence of Flores's guilt and could be used only for limited purposes. We presume the jury followed the court's instructions. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.) This was sufficient to ensure the jury understood the limited relevance of Dr. Jones's testimony and used it only for a proper purpose. (See *Bowker, supra*, 203 Cal.App.3d at p. 394; *Housley, supra*, 6 Cal.App.4th at pp. 958–959.) The court did not err in permitting Dr. Jones's testimony.[2]

---

[2] For the first time in his reply brief, Flores asserts Dr. Jones's testimony was inadmissible because it was unreliable, the public no longer holds misconceptions about child sexual abuse victims, and there was no showing that individual jurors held such misconceptions. He also urges us to follow authority from other jurisdictions that have held CSAAS evidence to be generally inadmissible. Because Flores did not raise these arguments in his opening brief, they are untimely and we decline to consider them. (See *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26 [points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before].)

Because Dr. Jones's testimony was properly admitted, we reject Flores's argument that his counsel was ineffective in failing to object to it. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587 ["[c]ounsel is not required to proffer futile objections"]; *People v. Price* (1991) 1 Cal.4th 324, 387 ["[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile"].)

## II. Flores Forfeited His Arguments Regarding the Fines, Fees, and Assessments

At the sentencing hearing, the trial court imposed a $300 restitution fine (§ 1202.4, subd. (b)), and a $300 parole revocation restitution fine (§ 1202.45), which it stayed unless parole is revoked. It further imposed an $80 court security fee (§ 1465.8) and a $60 criminal conviction assessment (Gov. Code, § 70373). On count one, the court imposed a sex offender fine of $300, plus penalty assessments of $930 (§ 290.3). On count two, it imposed a sex offender fine of $500, plus penalty assessments of $1,550 (§ 290.3). Flores did not object to any of these fines, fees, or assessments.

In supplemental briefing, Flores challenges the imposition of these fines, fees, and assessments on due process and equal protection grounds. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), he requests we vacate or stay them until the People prove he has the present ability to pay them.[3]

---

[3] In *Dueñas*, the court held that "due process of law requires the trial court to conduct an inability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) It also held that "although Penal Code section 1202.4 bars consideration of a

Flores, however, concedes he did not raise this issue in the trial court. For the reasons set out in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*), we find the issue forfeited. (See also *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 [finding forfeiture where defendant failed to object to fines and fees under sections 1202.4, 1465.8, and 290.3, and Government Code sections 70373 and 29550.1, based on inability to pay]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [citing *Frandsen* to find *Dueñas* issue forfeited for failure to object in trial court]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to object to imposition of a restitution fine under former section 1202.4 based on inability to pay].)

Flores submits three reasons why there was no forfeiture, none of which has merit. First, he contends there was no forfeiture because a claim that a trial court failed to exercise discretion vested in it by law is subject to review on appeal absent an objection. Even if that were true, we are not presented with such a situation here. Flores does not assert that the trial court failed to exercise its discretion. Rather, he contends the court erroneously imposed the fines, fees, and assessments without first determining whether he had the ability to pay them. Sentences imposed in a procedurally or factually flawed manner, as Flores insists was the case here, are subject to the regular forfeiture rules. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

---

defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

Flores next contends the claim is not forfeited because the court's imposition of the fines, fees, and assessments without an ability-to-pay determination resulted in the imposition of an unauthorized sentence, which is not subject to the regular forfeiture rules. As our Supreme Court has explained, "the 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott, supra*, 9 Cal.4th at p. 354.) It applies only where the sentence could not be lawfully imposed under any circumstances in a particular case. (*Ibid.*) Here, Flores concedes that the court could have imposed each of the fines, fees, and assessments, if only it had made certain factual findings after conducting an inability-to-pay hearing. In other words, he concedes there are certain circumstances in which the sentence would have been proper. As such, the "unauthorized sentence" exception to the general forfeiture rules does not apply.

Finally, Flores insists that his failure to object is excused because, at the time of his sentencing hearing, *Dueñas* had not yet been decided. Therefore, he contends, the law was against him and any objection to the fines, fees, and assessments would have been futile. We are not persuaded.

Even before *Dueñas* was decided, section 290.3 expressly contemplated an objection based on inability to pay. It provides that the trial court must impose a fine upon a defendant's conviction for certain offenses "unless the court determines that the defendant does not have the ability to pay the fine." (§ 290.3, subd. (a).) Here, the trial court imposed $3,280 in fines and penalty assessments under section 290.3. It was therefore incumbent on Flores to exercise his statutory right to object to

these fines and assessments on the basis that he did not have the ability to pay.

Flores suggests he was not required to raise such an objection because pre-*Dueñas* case law places the burden on the defendant to prove an inability to pay a fine under section 290.3, whereas *Dueñas* suggests the burden is on the prosecutor. (Compare *People v. Walz* (2008) 160 Cal.App.4th 1364, 1370–1371 [the burden is on the defendant to prove his inability to pay a section 290.3 fine] with *Dueñas, supra*, 30 Cal.App.5th at pp. 1172–1173 [staying section 1202.4 restitution fine until the People prove the defendant has the present ability to pay it].) We find that fact wholly irrelevant to the forfeiture analysis. At the time of the sentencing hearing, Flores knew the trial court could not impose the section 290.3 fines if it found he was unable to pay them. Regardless of who had the burden of proof, Flores had every incentive to raise an objection and make a proper record on that issue. He declined to do so, which has forfeited the issue on appeal.

The same is true of the fines, fees, and assessments imposed under sections 1202.4 and 1465.8, and Government Code section 70373. Initially, given Flores declined to object to the $3,280 in fines and assessments imposed under section 290.3 based on his inability to pay, we are confident he would not have objected to these additional fines, fees, and assessments, which totaled only $740.

In any event, although the statutory provisions for these fines, fees, and assessments suggest they are mandatory, nothing in the record of the sentencing hearing indicates that Flores was foreclosed from making the same request that the defendant in *Dueñas* made in the face of similar mandatory assessments.

We also disagree with Flores's suggestion, made in passing, that the eventual success of such arguments was unforeseeable. As Flores himself acknowledges, *Dueñas* was decided based on longstanding constitutional principles and represents a clarification of existing law rather than new law. We therefore stand by the traditional and prudential virtue of requiring parties to raise an issue in the trial court if they desire appellate review of that issue.

**DISPOSITION**

The judgment is affirmed.

BIGELOW, P. J.

We concur:

GRIMES, J.

WILEY, J.